

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAVIER ALMAGUER, JR.,

Plaintiff,

v.

K. NIXON, et al.,

Defendants.

No. 1:24-cv-00399 GSA (PC)

ORDER AND FINDINGS AND
RECOMMENDATIONS

ORDER RECOMMENDING SUMMARY
DISMISSAL OF COMPLAINT FOR
FAILURE TO EXHAUST
ADMINISTRATIVE REMEDIES

PLAINTIFF'S OBJECTIONS DUE **MAY 23,
2024**

Plaintiff, a state prisoner proceeding pro se and in forma pauperis, has filed this civil rights action seeking relief under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

Before this Court is Plaintiff's complaint and his showing of cause related to his failure to exhaust administrative remedies. ECF Nos. 1, 10 (complaint; showing of cause, respectively). For the reasons stated below, the undersigned will recommend that this matter be summarily dismissed for failure to exhaust.

I. BACKGROUND

A. The Complaint

Plaintiff is an inmate at North Kern State Prison ("NKSP"). ECF No. 1 at 1. His

1 complaint names several employees at NKSP as Defendants in this action. See id. at 1, 3. The
2 claims generally stem from Defendants allegedly giving him incorrect medication on March 6,
3 2024, and/or their failure to properly respond to the error. See generally id. at 3, 5-6.

4 Plaintiff seeks injunctive relief in the form of staff training, and the firing, reprimand
5 and/or pay cut for certain Defendants. ECF No. 1 at 8. He also seeks compensatory damages in
6 the amount of \$250,000.00. Id.

7 B. Date of Filing

8 Although the events of which Plaintiff contends constituted violations of his constitutional
9 rights occurred on March 6, 2024, (see ECF No. 1 at 2-3, 5) (date Plaintiff states his rights were
10 violated), it was on March 23, 2024, that Plaintiff filed the instant complaint.¹ See ECF No. 1 at
11 10 (signature date on complaint). In the complaint, Plaintiff states that there is a grievance
12 procedure at NKSP, but that he has not completed it. Id. at 2. He provides no excuse for not
13 having completed the administrative grievance process. See generally id. He simply states that
14 prison officials have yet to respond to his grievance. Id.

15 C. Order to Show Cause

16 The short period of time between the incident of Defendants allegedly giving Plaintiff
17 incorrect medication – March 6, 2024, – and the time Plaintiff filed the instant complaint – March
18 20, 2024, – as well as the fact that Plaintiff stated in the complaint that he had yet to exhaust
19 administrative remedies, led the Court to order Plaintiff to show cause why the matter should not
20 be summarily dismissed for failure to exhaust. See ECF No. 9. The order was issued on April 8,
21 2024.

22 On April 26, 2024, Plaintiff's showing of cause was docketed. ECF No. 10. The Court
23 considers its contents herein.

24 II. PLAINTIFF'S SHOWING OF CAUSE

25 ¹ The signing date of a pleading is the earliest possible filing date pursuant to the mailbox rule.
26 See Roberts v. Marshall, 627 F.3d 768, 769 n.1 (9th Cir. 2010) (stating constructive filing date for
27 prisoner giving pleading to prison authorities is date pleading is signed); Jenkins v. Johnson, 330
28 F.3d 1146, 1149 n.2 (9th Cir. 2003), overruled on other grounds by Pace v. DiGuglielmo, 544
U.S. 408 (2005).

1 In Plaintiff's showing of cause, he argues that the form of appeal one is required to submit
 2 depends on the kind of grievance one has, e.g., ADA, mental health, and health care. ECF No. 10
 3 at 2. He further contends that the appeal requirements are not applicable in his case because a
 4 health care grievance "is only recognized as a medical staff complaint for 'excessive force' . . . or
 5 'sexual misconduct,' and [it] applies to medical care issues[,] but [it] does not cover [his] specific
 6 issue." ECF No. 10 at 2 (brackets added). Citing to Ross v. Blake, 578 U.S. 632 (2016), Plaintiff
 7 argues that because the grievance form available to him does not cover the type of medical staff
 8 misconduct he experienced, the Court should find that the administrative remedy of exhaustion is
 9 unavailable to him because "it operates as a simple dead end in [] [his] specific circumstances."
 10 ECF No. 10 at 3 (brackets added) (internal quotation marks omitted).

11 Plaintiff requests in the alternative that if the Court does not follow Ross, it should grant
 12 him an additional sixty-day extension of time to complete the exhaustion process. ECF No. 10 at
 13 2-3. He contends that the grant of an extension of time will enable him to show that the grievance
 14 process at NKSP is, in effect, a "dead end" remedy.² Id. at 3 (internal quotation marks omitted).

15 III. APPLICABLE LAW: THE EXHAUSTION REQUIREMENT

16 A. The Prison Litigation Reform Act

17 Because Plaintiff is a prisoner challenging the conditions of his confinement, his claims
 18 are subject to the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a). The PLRA
 19 requires prisoners to exhaust available administrative remedies before bringing an action
 20 challenging prison conditions under Section 1983. 42 U.S.C. § 1997e(a). "The PLRA mandates
 21 that inmates exhaust all available administrative remedies before filing 'any suit challenging
 22 prison conditions,' including, but not limited to, suits under [Section] 1983." Albino v. Baca, 747
 23 F.3d 1162, 1171 (9th Cir. 2014) (quoting Woodford v. Ngo, 548 U.S. 81, 85 (2006)).

24 "[F]ailure to exhaust is an affirmative defense under the PLRA." Jones v. Bock, 549 U.S.

25 ² In support of this request, Plaintiff states that a health care grievance filed on a 602-HC form
 26 only has two levels of review. ECF No. 10 at 3. The first level, Plaintiff contends, has a forty-
 27 five-day time limitation for processing and return to the inmate. Id. The second level of review,
 28 Plaintiff further contends, takes sixty days to process and return. Id. Given these processing
 times, Plaintiff argues that granting him a sixty-day extension of time will enable him to exhaust
 and will provide support for his "dead end" remedy argument. Id.

1 199, 216 (2007). As a result, it is usually a defendant's burden “to prove that there was an
2 available administrative remedy and that the prisoner did not exhaust that available remedy.”
3 Albino, 747 F.3d at 1172 (citing Hilao v. Estate of Marcos, 103 F.3d 767, 778 n.5 (9th Cir.
4 1996)). The burden then “shifts to the prisoner to come forward with evidence showing that there
5 is something in his particular case that made the existing and generally available administrative
6 remedies unavailable to him.” Id.

7 At the same time, however, “a complaint may be subject to dismissal for failure to state a
8 claim when an affirmative defense (such as failure to exhaust) appears on the face of the
9 pleading.” Jones, 549 U.S. at 215. Exhaustion is not a jurisdictional requirement for bringing an
10 action. See Woodford, 548 U.S. at 101.

11 Regardless of the relief sought, “[t]he obligation to exhaust ‘available’ remedies persists
12 as long as *some* remedy remains ‘available.’ Once that is no longer the case, then there are no
13 ‘remedies ... available,’ and the prisoner need not further pursue the grievance.” Brown v. Valoff,
14 422 F.3d 926, 935 (9th Cir. 2005) (emphasis and alteration in original) (citing Booth v. Churner,
15 532 U.S. 731 (2001)).

16 “Under § 1997e(a), the exhaustion requirement hinges on the ‘availab[ility]’ of
17 administrative remedies: An inmate ... must exhaust available remedies, but need not exhaust
18 unavailable ones.” Ross, 578 U.S. at 642 (brackets in original). In discussing availability in
19 Ross, the Supreme Court identified three circumstances in which administrative remedies were
20 unavailable: (1) where an administrative remedy “operates as a simple dead end” in which
21 officers are “unable or consistently unwilling to provide any relief to aggrieved inmates;” (2)
22 where an administrative scheme is “incapable of use” because “no ordinary prisoner can discern
23 or navigate it;” and (3) where “prison administrators thwart inmates from taking advantage of a
24 grievance process through machination, misrepresentation, or intimidation.” Ross, 578 U.S. at
25 643-44. “[A]side from [the unavailability] exception, the PLRA's text suggests no limits on an
26 inmate's obligation to exhaust – irrespective of any ‘special circumstances.’ ” Id. at 639.
27 “[M]andatory exhaustion statutes like the PLRA establish mandatory exhaustion regimes,
28 foreclosing judicial discretion.” Id. at 639.

1 B. California Regulations Governing Exhaustion of Administrative Remedies

2 “The California prison system's requirements ‘define the boundaries of proper
3 exhaustion.’ ” Marella v. Terhune, 568 F.3d 1024, 1027 (9th Cir. 2009) (quoting Jones, 549 U.S.
4 at 218). In order to exhaust, the prisoner is required to complete the administrative review
5 process in accordance with all applicable procedural rules. Woodford, 548 U.S. at 90. The
6 appeal process is initiated by an inmate filing a “Form 602” the “Inmate/Parolee Appeal Form,”
7 and describing the specific issue under appeal and the relief requested. “The California prison
8 grievance system has two levels of review. See Cal. Code Regs. tit. 15, §§ 3999.226(a)(1);
9 3481(a); 3483; 3485 (health care and standard grievances, respectively). An inmate exhausts
10 administrative remedies by obtaining a decision at each level.” Reyes v. Smith, 810 F.3d 654,
11 657 (9th Cir. 2016) (citing Cal. Code Regs. tit. 15, § 3084.1(b) (2011) (repealed); Harvey v.
12 Jordan, 605 F.3d 681, 683 (9th Cir. 2010)).

13 IV. DISCUSSION

14 The PLRA requires prisoners to exhaust available administrative remedies before bringing
15 an action challenging prison conditions under Section 1983. 42 U.S.C. § 1997e(a). “The PLRA
16 mandates that inmates exhaust all available administrative remedies before filing ‘any suit
17 challenging prison conditions,’ including, but not limited to, suits under [Section] 1983.” Albino,
18 747 F.3d at 1171 (quoting Woodford, 548 U.S. at 85).

19 To the extent that Plaintiff argues that 602 HC grievance forms did not cover his specific
20 issue (see ECF No. 10 at 2) – e.g., that he was given incorrect medication – and that for this
21 reason going through the appeals process was effectively a dead end-- this argument is without
22 merit. The idea that prisons must provide grievance forms for every type of varying set of facts
23 would not only be impractical in practice, but it is also untrue. Courts have clearly and
24 consistently stated that prisoners do not have a separate constitutional entitlement to a specific
25 prison grievance procedure. Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir. 2003) (citing Mann
26 v. Adams, 855 F.2d 639, 640 (9th Cir. 1988)); Hernandez v. Cate, 918 F. Supp. 2d 987, 1009-10
27 (C.D. Cal. 2013).

28 To the extent that Plaintiff argues that health care grievances – i.e., 602 HC forms – only

1 have two levels of review (see ECF No. 10 at 3), he is correct.³ Currently, state codes provide for
 2 only two levels of review for health care grievances: an institutional level and a headquarters
 3 level.⁴ See Cal. Code Regs. tit. 15, § 3999.226(a)(1). Health care grievances are subject to the
 4 headquarters level of disposition before an inmate's administrative remedies are deemed
 5 exhausted. Id. at 3999.226(g).

6 These facts, however, do not help Plaintiff as Plaintiff clearly states both in the complaint
 7 and in the showing of cause that prior to filing the instant complaint he had not exhausted his
 8 administrative remedies at the two levels. See ECF No. 1 at 2; ECF No. 10 at 3-4 (complaint and
 9 showing of cause stating same, respectively).

10 Given that exhaustion is a necessary requirement prior to bringing a complaint, Plaintiff's
 11 failure to do so requires that this matter be summarily dismissed. The Court has no other choice.
 12 See 42 U.S.C. § 1997e(a) (exhaustion requirement); McKinney v. Carey, 311 F.3d 1198, 1199
 13 (9th Cir. 2002) (per curiam) (citation omitted) (stating exhaustion requirement is mandatory).
 14 "Exhaustion is no longer left to the discretion of the . . . court, but is mandatory." Woodford, 548
 15 U.S. at 85 (citation omitted); Jackson v. Fong, 870 F.3d 928, 933 n.2 (9th Cir. 2017) (quoting
 16 Woodford, 548 U.S. at 93).

17 For these reasons, Plaintiff's showing of cause why this matter should not be dismissed is
 18 unpersuasive. Therefore, the undersigned will recommend that Plaintiff's complaint be
 19 summarily dismissed for failure to exhaust administrative remedies prior to filing it in this Court.

20 Accordingly, IT IS HEREBY ORDERED that the Clerk of Court shall randomly assign a
 21 District Judge to this action.

22 IT IS FURTHER RECOMMENDED that this matter be SUMMARILY DISMISSED for
 23

24 ³ Accordingly, the Court's statement in its order to show cause which asserted a three-level-
 25 review requirement (see ECF No. 9 at 4) is incorrect.

26 ⁴ Additionally, with respect to standard 602 form grievances, they also have only two levels of
 27 review: a grievance level, and an appeals level. See Cal. Code Regs. tit. 15, §§ 3481(a); 3483;
 28 3485; Stone v. Robinson, No. 1:19-cv-00703 DAD HBK, 2021 WL 4355607, at *5 (E.D. Cal.
 Sept. 24, 2021) (stating same). The completion of the review process by the Office of Appeals
 which results in specific listed decisions in the code constitutes the exhaustion of all
 administrative remedies. See Cal. Code Regs. tit. 15, § 3485(l)(1).

failure to exhaust administrative remedies prior to filing it in federal court. See 42 U.S.C. § 1997e(a).

These findings and recommendations are submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days after being served with these findings and recommendations – **by May 23, 2024**, – Plaintiff may file written objections with the Court. Such a document should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” Plaintiff is advised that failure to file objections within the specified time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: May 9, 2024

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE